Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	CC Docket No. 02-33
Universal Service Obligations of Broadband Providers	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review — Review of Computer III and ONA Safeguards and Requirements	CC Docket Nos. 95-20, 98-10

REPLY COMMENTS IN SUPPORT OF VERIZON'S PETITION FOR LIMITED RECONSIDERATION OF THE TITLE I BROADBAND ORDER

I. INTRODUCTION AND SUMMARY

The *Title I Broadband Order*[1] took an important step to benefit both consumers and competition by recognizing that wireline facilities-based providers may sell broadband transmission services under Title I of the Communications Act, either on a private carriage basis as a wholesale input to an affiliated or unaffiliated ISP's wireline broadband Internet access service, or as an information service when part of the facilities-based provider's own integrated wireline broadband Internet access service. As Verizon has explained, it fully supports that decision, which will enable Verizon and other wireline facilities-based providers to compete more effectively with other broadband Internet access providers, which have long been outside of Title II regulation.

[1] Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005) ("*Title I Broadband Order*").

The Commission, however, stopped short on one of the issues raised in the NPRM[2] and addressed extensively in the comments of parties on both sides of the issue — whether mandatory common carrier regulation should apply when wireline facilities-based providers sell broadband transmission service that will not be used as part of an Internet access service. Wireline facilities-based providers sell stand-alone packetized broadband transmission services, such as ATM and Frame Relay services, primarily to large enterprise customers. As the record here demonstrates — and as the Commission recently reconfirmed in approving the combinations of Verizon and MCI and SBC and AT&T — competition to provide these services is already robust. Moreover, the customers that purchase these services are highly sophisticated and utilize competitive bidding processes that further prevent any single provider from exercising market power. For these reasons, under long-standing court and Commission precedent, there is no justification for compelling wireline facilities-based providers to offer *any* broadband transmission services on a common carrier basis. Instead, all such services should be permitted to be offered on a private carriage basis under Title I.

The comments in opposition to Verizon's petition lack merit. *First*, Verizon's petition for limited reconsideration is procedurally proper: the NPRM expressly raised the question whether common carrier regulation applies to broadband transmission service offered separate from Internet access, yet the Commission did not substantively address that issue despite the fact that parties on both sides of the issue commented extensively on it.

Second, the commenters are wrong about the applicable legal standard: the lack of market power is a sufficient ground for not mandating that wireline facilities-based carriers offer

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[2] Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019 (2002) ("NPRM").

broadband transmission service on a common carrier basis, and the fact that carriers do so today as a matter of regulatory compulsion is irrelevant to the common carrier inquiry.

Third, the commenters' claims that incumbent LECs have market power for broadband transmission services is directly contrary to the record here and the Commission's determinations in the *Verizon-MCI Order*[3] and *SBC-AT&T Order*[4] that there is already robust competition to provide broadband transmission services. Moreover, those claims are based on a fundamental confusion about the wires that physically carry the transmission and the electronics that perform the broadband and packet functions. Even after Verizon's petition is granted, Verizon and other incumbent LECs will continue to offer access to existing TDM-based transport, either on a common carrier basis or as UNEs (to the extent the statutory impairment standard is satisfied). Other carriers can continue to provide their own broadband services by attaching their own packet switches to any such facilities obtained from incumbents, and the commenters make no claim — nor could they — that there is any impediment to the self-provision of such switches.

Fourth, the conditions adopted as part of the Commission's approval of the combination of Verizon and MCI pose no bar to a ruling granting Verizon's petition. Although Verizon intends to comply fully with the terms of those conditions, the existence of the conditions has no bearing on the appropriate regulatory classification of the wireline broadband transmission services at issue. Those conditions say nothing about the appropriate regulatory classification of any service Verizon sells.

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[3] Memorandum Opinion and Order, *Verizon Communications Inc. and MCI Inc., Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433 (2005) ("*Verizon-MCI Order*").

[4] Memorandum Opinion and Order, *SBC Communications Inc. and AT&T Corp., Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290 (2005) ("*SBC-AT&T Order*").

II. VERIZON'S REQUEST FOR RECONSIDERATION IS WITHIN THE SCOPE OF THIS PROCEEDING

In the NPRM, the Commission expressly directed commenters to "address what the appropriate statutory classification of broadband transmission should be when it is *not coupled with* the Internet access component." NPRM ¶ 26 (emphasis added). The Commission, moreover, instructed commenters to "discuss how judicial and Commission definitions of common carriage might apply" to such broadband transmission, including "the standards for private and common carriage that they deem appropriate for broadband transmission, whether using xDSL *or other wireline technologies*." *Id.* ¶ 26 & n.64 (emphasis added). Verizon, therefore, submitted comments demonstrating that all wireline broadband transmission services, including packetized broadband transmission services like ATM and Frame Relay, should be classified under Title I, even when provided separate from Internet access service.[5] The Commission, however, did not address that showing in the *Title I Broadband Order*, concluding only that stand-alone wireline broadband transmission is not an information service. Because that ruling is not dispositive of the question whether such transmission *must* be offered on a common carrier basis, Verizon filed this petition for limited reconsideration.

Some commenters, however, claim that Verizon's request for reconsideration is procedurally invalid. For example, Earthlink (at 1-2) complains that Verizon's petition repeats arguments found in its comments and cites prior Commission decisions rejecting petitions for reconsideration that merely repeat claims that the Commission had considered and rejected. But there can be no dispute that the Commission did not substantively consider or reject Verizon's arguments, making them appropriate for inclusion in a petition for reconsideration.

[5] *See* Verizon Comments at 9-23; Verizon Pet. at 4-5.

Nor is there any merit to claims by XO (at 4) and Broadwing (at 1-3) that the ruling Verizon sought in its comments and in its petition for reconsideration can be granted only in other proceedings pending before the Commission. The NPRM plainly sought comment on the "appropriate statutory classification of broadband transmission . . . when it is not coupled with [an] Internet access component" and, moreover, made express reference to the question of "how judicial and Commission definitions of common carriage might apply" to such transmission. NPRM ¶ 26. Verizon and others[6] provided comments demonstrating that all broadband transmission services should be classified under Title I, regardless of whether they are provided in combination with or as an input to a broadband Internet access services. Others filed comments in opposition to these showings.[7] In these circumstances, a ruling granting Verizon's petition for limited reconsideration would easily satisfy the notice-and-comment requirements of the Administrative Procedure Act. *See New York v. EPA*, 413 F.3d 3, 32 (D.C. Cir. 2005) ("Central to notice-and-comment rulemaking is the ability of an agency to craft a final rule based on the comments of interested parties."); *see also Crawford v. FCC*, 417 F.3d 1289, 1295-96 (D.C. Cir. 2005) (explaining that the notice-and-comment requirement standard is satisfied where "affected part[ies] should have anticipated the agency's final course in light of the initial notice," particularly where the agency "was merely doing that which [it] announced it would do") (internal quotation marks omitted).[8] Moreover, the Commission has an obligation in notice-and-comment proceedings to address explicitly arguments raised by commenters that, as here,

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[6] *See* Verizon Pet. at 4 n.6.

[7] *See, e.g.*, AOL Time Warner Reply Comments at 16-17; AT&T Reply Comments at 43-46.

[8] In any event, it is settled that "actual notice will render" an alleged deficiency in the notice "harmless." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

are within the scope of the proceeding. *See, e.g., Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 468 (D.C. Cir. 1998) ("An agency must . . . demonstrate the rationality of its decision-making process by responding to those comments that are relevant and significant.").

III. THE COMMISSION SHOULD GRANT THE PETITION AND PERMIT WIRELINE BROADBAND SERVICE PROVIDERS THE OPTION OF OFFERING ALL BROADBAND TRANSMISSION SERVICES ON A PRIVATE CARRIAGE BASIS UNDER TITLE I

A. Under the Applicable Legal Standard, the Fundamental Question Is Whether Wireline Facilities-Based Providers Have Market Power with Respect to Wireline Broadband Services Not Used for Internet Access

In the 1996 Act, Congress adopted a definition of "telecommunications carrier" that provides that such carriers "shall be treated as a common carrier under th[e] [Communications Act] only to the extent that it is engaged in providing telecommunications services." 47 U.S.C. § 153(44). "Telecommunications service," in turn, is defined as the "offering of telecommunications for a fee" that is "effectively available directly to the public." *Id.* § 153(46). As the Commission has held — and the D.C. Circuit has affirmed — these 1996 Act definitions effectively codify the two-part test established in *NARUC I* and its progeny.[9] The Commission, therefore, was required to "consider whether, under the first part of the *NARUC I* test, the public interest requires common carrier" regulation of those wireline broadband transmission services. *Virgin Islands*, 198 F.3d at 925 (internal quotation marks omitted). As we have demonstrated, and discuss further below, there is no basis for compelling common carrier treatment of wireline broadband services — whether offered with or separate from a broadband Internet access

[9] *See Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 925-27 (D.C. Cir. 1999); *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641-43 (D.C. Cir. 1976) ("*NARUC I*").

component — because incumbent LECs have "little or no market power" with respect to those services.[10]

The second part of the *NARUC I* test — whether the carrier has a *voluntary* "practice of . . . indifferent service that confers common carrier status"[11] — is relevant only in the *absence* of such regulatory compulsion, because it cannot be satisfied in the presence of such regulation. That is because a "binding requirement of . . . indifferent service" precludes the need for consideration of carriers' voluntary practices, because courts and the agency "know what those [practices] will be if the FCC regulations are followed." *NARUC II*, 533 F.2d at 609. As Verizon's petition and the supporting comments make clear, but for the existing legal compulsion to offer wireline broadband services on a common carrier basis, Verizon and other incumbents LECs would make individualized decisions in the provision of their wireline broadband services to the enterprise customers that purchase this service — because that is what those customers demand. *See, e.g.*, Verizon Pet. at 5-6, 11-12.

Indeed, in the *Title I Broadband Order* itself, the wireline broadband services that the Commission classified under Title I had previously been offered on a common carrier basis as a matter of regulatory compulsion. *See, e.g., Title I Broadband Order* ¶ 106. This determination, as the Commission recognized, is fully consistent with both the *Cable Modem Declaratory Ruling*[12] and the Supreme Court's decision in *Brand X*. The Supreme Court's decision confirms

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[10] *Cox Cable Communications, Inc., Commline, Inc. and Cox DTS, Inc.*, 102 F.C.C.2d 110, ¶ 27 (1985), *vacated as moot*, 1 FCC Rcd 561, ¶ 5 (1986); *see, e.g.*, Verizon Pet. at 7-12.

[11] *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) ("*NARUC II*").

[12] Declatatory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002) ("*Cable Modem Declaratory Ruling*"), *aff'd, National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005) ("*Brand X*").

that the Commission acts properly when it relies on "contemporaneous market conditions" — rather than past regulatory requirements — in determining whether to classify a service under Title I. 125 S. Ct. at 2711.

Some commenters contend that a different legal standard applies, but there is no merit to those claims. CompTel (at 9-13) and XO (at 5), for example, assert that the fact that Verizon and other incumbent LECs currently offer wireline broadband services on a common carrier basis is dispositive, and that it is irrelevant that these carriers are doing so because the Commission has required them to do so. But neither cites any authority in support of these claims and, as shown above, D.C. Circuit precedent establishes precisely the opposite rule. Indeed, in allowing existing DSL transport services to be offered on a private carriage basis, the Commission has rejected this same argument. *See Title I Broadband Order* ¶ 106 ("The previous orders . . . assumed . . . that the offering of DSL transmission on a common carrier basis was a telecommunications service. These decisions, however, did not address the important public interest issue we address in this Order — whether this broadband transmission component must continue to be offered . . . on a common carrier basis."). Moreover, that same decision and other court precedent make clear that the Commission has authority to hold that services that were "initially treated as common carrier offerings" no longer need to be provided as such, if after "further inspection they [are] determined not to be common carriage communications offerings within the meaning of the Act."[13]

[13] *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1483 (D.C. Cir. 1994); *see Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 210 (D.C. Cir. 1982) (upholding the Commission's conclusion that a service "originally regulated under Title II" "is not a common carrier service" based on the Commission's finding of the existence of "healthy competition" in a "competitive market" by non-common carriers).

XO (at 4-5) similarly argues that the existence of competition is irrelevant to the question whether wireline broadband services must be offered on a common carrier basis when sold apart from an Internet access component. But its argument reduces to the claim — rejected by the Commission in a decision upheld by the D.C. Circuit — that 1996 Act's definition of "telecommunications service" eliminated, rather than codified, the two-part *NARUC I* test. *See Virgin Islands*, 198 F.3d at 925-27. CompTel (at 8 n.20) offers a more subtle, but equally erroneous claim: that the existence of a competitive market is relevant only with respect to services that have not yet been deployed.[14] CompTel contends further that, for services that have already been deployed, the only question is whether the carrier offers them indifferently to the eligible public. Again, however, CompTel presumes that it makes no difference whether a service is offered indifferently to the public as a result of *regulatory compulsion* or a carrier's voluntary choice. As shown above, the Commission precedent here and case law draw exactly that distinction.[15]

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[14] Presumably, Broadwing (at 3-4) is making a similar (and equally erroneous) point when it notes that ATM and Frame Relay are "legacy" services. Nothing in the *NARUC I* two-part test turns on whether a service is new or whether it has existed for some time. And as discussed above, the Commission is free to reconsider a previous decision that a particular service must be sold on a common carriage basis. *See Southwestern Bell*, 19 F.3d at 1483.

[15] CompTel (at 14-19) goes to great length in an attempt to dispute our showing (at 10-11 & n.24) that granting Verizon's petition is consistent with the *Cable Modem Declaratory Ruling* and the Supreme Court's *Brand X* decision. But try as it might, CompTel cannot dispute that granting Verizon's petition would remove burdens from wireline facilities-based carriers that have never applied to, or were long ago eliminated for, other providers of broadband transmission services. For example, more than a decade ago, the Commission gave providers of satellite transmission services the option of offering transmission services on a private carrier basis under Title I. *See* Declaratory Ruling, *Licensing Under Title III of the Communications Act of 1934, as amended*, 8 FCC Rcd 1387 (1993); Order and Authorization, *Application of Loral/Qualcomm Partnership, L.P.*, 10 FCC Rcd 2333 (Int'l Bur. 1995). Likewise, the Commission permitted the same Title I treatment for, among other things, transmission services provided over submarine cables. *See* Memorandum Opinion and Order, *AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585 (1998), *aff'd, Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999). Even the traditional long distance companies and CLECs, which have

Finally, Time Warner Telecom (at 16-19) asserts that "in nearly every case" where the Commission has determined not to mandate the provision of a service under Title II, it did so "because of the availability of other *common carrier* offerings, not merely other *competitive* offerings." Time Warner Telecom hardly substantiates its claim, pointing to only a handful of examples from among the many that Verizon identified where the Commission has not required the provision of service on a common carrier basis. *See* Verizon Pet. at 9-10 & n.22. In numerous instances, the Commission has held that it would not require provision of service on a common carrier basis without even mentioning, let alone considering, whether other carriers were providing the service on a common carrier basis.[16] In addition, the Commission's *Title I Broadband Order* itself came to the opposite conclusion.

Moreover, in the cases on which Time Warner Telecom relies, the Commission did not hold that the voluntary offering by some carriers of service on a common carrier basis was *necessary* before other carriers could be given the option of offering service on a private carriage basis. Instead, the Commission simply noted the existence of such carriers as part of its determination in those specific cases, under the first step of the *NARUC I* test, that the public interest did not require common carrier provision of those services.[17] Importantly, Time Warner

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remained nominally under Title II, have been permitted to sell broadband transmission services without the burdensome economic regulation and tariffing requirements imposed on Verizon and other ILECs.

[16] *See, e.g.*, Memorandum Opinion and Order, *NorLight*, 2 FCC Rcd 5167 (1987); Order and Authorization, *Application of Loral/Qualcomm Partnership, L.P.*, 10 FCC Rcd 2333 (1995); Report and Order, *Amendment of Subpart C Part 90 of the Commission's Rules to Permit Enterprises to be Licensed Directly in the Special Emergency Radio Service*, 3 FCC Rcd 3677 (1988); Memorandum Opinion and Order, *Amendment of Subpart C of Part 90 of the Commission's Rules to Permit Commercial Enterprises to be Licensed Directly in the Special Emergency Radio Service*, 5 FCC Rcd 3471 (1990).

[17] *See, e.g.*, *Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1474-75 (D.C. Cir. 1984).

Telecom cannot show, and does not even claim, that the public interest *in this case* requires the existence of some carriers offering broadband transmission on a common carrier basis. As shown below, the robust, existing competition to provide broadband transmission services to enterprise customers demonstrates that there is no public interest basis for requiring, as a condition for granting Verizon's petition, that *some* companies in this competitive market segment voluntarily offer broadband transmission on a common carrier basis.

B. The Robust Competition for Broadband Transmission Services Demonstrates the Lack of Market Power and Therefore the Lack of Any Need for Mandatory Common Carrier Regulation

As Verizon has demonstrated, the record here shows that stand-alone broadband transmission services sold to enterprise customers are subject to intense competition, and incumbent LECs have never had market power with respect to these services. *See* Verizon Pet. at 13-15. The Commission, in its recent orders approving the combinations of Verizon and MCI and SBC and AT&T, has expressly recognized this. Indeed, the Commission found, rejecting commenters' "contrary . . . assertions," that "competition in the enterprise market is *robust*." *SBC-AT&T Order* ¶ 73 n.223 (emphasis added). The Commission recognized that "myriad providers are prepared to make competitive offers" to enterprise customers and that "these multiple competitors ensure that there is sufficient competition." *Verizon-MCI Order* ¶ 74; *accord SBC-AT&T Order* ¶ 73. In reaching this conclusion, the Commission made specific reference to Frame Relay services, one of the wireline broadband transmission services at issue here. *See Verizon-MCI Order* ¶ 74. The Commission recognized further that "new competitors" — including "systems integrators and managed network providers" and those offering "IP-VPNs and other converged services" — "are putting *significant competitive pressure* on traditional service providers" with respect to enterprise customers. *See id.* ¶ 75 n.229 (emphasis added).

In addition, the Commission recognized that the enterprise customers that purchase these wireline broadband transmission services are "highly sophisticated" and can "negotiate for significant discounts." *Id.* ¶ 75. As the Commission explained, this level of sophistication is "significant not only because it demonstrates that these users are aware of the multitude of choices available to them, but also because they show that these users are likely to make informed choices based on expert advice" to "seek out best-price alternatives." *Id.* ¶ 76. This "process of competitive bidding and contract renegotiation is often sufficient . . . [to] compel[] the supplier to offer lower prices and improved service to retain the [enterprise] customer." *SBC-AT&T Order* ¶ 74 n.226.

For all of these reasons, there is no public interest reason to compel wireline facilities-based providers to provide broadband transmission services on a common carrier basis. That is especially true because, as the Commission has recognized, contracts with enterprise customers "are typically the result of RFPs," "are individually-negotiated," and "are generally for customized service packages"[18] — the antithesis of common carrier offerings.

Some of the commenters dispute the extent of competition to provide broadband transmission services to enterprise customers, *see, e.g.*, Broadwing at 4-7; Earthlink at 3-4; Time Warner Telecom at 8-11, but they ignore the Commission's conclusions in the *Verizon-MCI Order* and the *SBC-AT&T Order*, as well as the record evidence here.[19]

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[18] *Verizon-MCI Order* ¶ 79.

[19] Earthlink contends that a different result should apply when it and other dial-up Internet service providers seek to purchase wireline *broadband* transmission services for use with their provision of *narrowband* service to their customers. *See* Earthlink at 3. Contrary to Earthlink's claim, the *Title I Broadband Order* does not "confirm[] that [*Computer II* and *Computer III*] obligations . . . continue in effect." *Id.* On the contrary, the Commission held only that the *Title I Broadband Order* did not change "the current rules or regulatory framework for the provision of access to *narrowband* transmission associated with dial-up Internet access services." *Title I Broadband Order* ¶ 9 n.15 (emphasis added). To the extent dial-up ISPs seek

Other commenters claim that Verizon continues to have market power in the provision of broadband transmission services because of alleged impediments that carriers face in deploying the loops and/or transport over which those broadband services are carried. *See, e.g.*, Broadwing at 7-10; Time Warner Telecom at 4-7, 12-16, 19-20; CompTel at 2-4. But the Commission rejected similar claims in granting Verizon a waiver to enable Verizon to obtain pricing flexibility for its advanced services.[20] That is because, as the Commission has recognized, such claims are based on a fundamental confusion about wireline broadband transmission services. Wireline broadband transmission services "are generally made up of packet switching equipment and facilities, such as Frame Relay or ATM switches," and "a special access line connection" that reaches the end-user customer. *Verizon Pricing Flexibility Waiver Order* ¶ 10.

But, as the Commission has further recognized, "competitors do not have to rely on Verizon's packet switching to provide their own advanced services to customers." *Id.* ¶ 11. As an initial matter, carriers are provided wireline broadband transmission services without using either Verizon's facilities or packet switching, by deploying their own facilities, or using third-party facilities, to serve these highly lucrative customers. In addition, carriers can — and already are — creating and selling their own broadband transmission services by combining "Verizon's special access facilities" with *their own* "[p]acket switch[es]." *Id.* Those TDM-based special access facilities are beyond the scope of this petition and will remain available through federal

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to purchase *broadband* transmission services, they are *already* covered by the Title I rulings in the present order. Thus, Earthlink is wrong (at 5-6) in claiming that the "provision of ATM and Frame Relay to ISPs" as part of a *broadband* Internet access service was not deregulated in the *Title I Broadband Order*. *See Title I Broadband Order* ¶ 9 n.15 (holding that the use of "ATM or frame relay transport" in "the[] network[]" does not "limit[] the scope of relief" the Commission provided for all wireline broadband transmission sold as a wholesale input for wireline broadband Internet access service).

[20] Memorandum Opinion and Order, *Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services*, 20 FCC Rcd 16840 (2005) ("*Verizon Pricing Flexibility Waiver Order*").

tariffs, subject to common carrier regulation, even after the Commission grants the relief sought here.[21] And there can be no serious claim that other carriers are unable to deploy their own packet switches or connect those switches to special access facilities, given the Commission's long-standing determination that carriers are not impaired without access to incumbents' packet switches and the fact that carriers have already deployed many thousands of such switches.[22]

Broadwing (at 11) asserts that granting Verizon's petition creates the possibility of a price squeeze. But the Commission rejected virtually identical, and equally unsubstantiated,[23] claims in the *Verizon Pricing Flexibility Waiver Order*. As the Commission explained there, claims such as Time Warner Telecom's "essentially restate allegations that special access rates are anticompetitive," which the Commission "is addressing through the *Special Access NPRM*." *Verizon Pricing Flexibility Waiver Order* ¶ 13. Verizon has also extensively rebutted the claims made in that proceeding and repeated in other proceedings. Because the Commission "is establishing a comprehensive record" in that proceeding, which it has explained will "enable it to asses any 'price squeeze' issues," that is the "appropriate proceeding to address [these] arguments concerning special access . . . rates." *Id.*

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[21] Those services will also remain subject — to the extent they are today — to the § 251(a) and (c) obligations that CompTel (at 3) erroneously asserts will be eliminated.

[22] *See, e.g.*, Order on Remand, *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 ¶¶ 205-209 (2005); Memorandum Opinion and Order, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), et al.*, 19 FCC Rcd 21496 (2004) (forbearing from enforcing any requirement of BOCs to provide access to packet switches under § 271), *petition for review filed, Earthlink, Inc. v. FCC*, No. 05-1087 (D.C. Cir.)

[23] The only "support" Broadwing offers is a citation to a three-year old pleading in another docket. *See* Broadwing at 11 n.38. *See Verizon Pricing Flexibility Waiver Order* ¶ 13 (finding that "AT&T ha[d] not presented sufficient evidence in th[at] proceeding to establish a price squeeze").

C. The Conditions on the Commission's Approval of the Combination of Verizon and MCI Pose No Impediment to the Relief Verizon Seeks Here

Earthlink (at 4-5) asserts that Verizon's petition is incompatible with four of the time-limited conditions adopted as part of this Commission's approval of the combination the two companies. In fact, none of the conditions poses any impediment to the granting of Verizon's petition. As an initial matter, Verizon plainly intends to comply fully with all of the conditions. But the existence of those conditions has no bearing on the question presented by the Commission's NPRM and addressed by commenters on both sides — whether wireline broadband transmission service sold by wireline facilities-based providers that will not be used in as part of an Internet access service should be classified under Title I. That is because the conditions, by their plain terms, do not compel common carrier classification for any service, let alone the wireline broadband transmission services at issue here.

Indeed, the only condition specifically applicable to special access prices — which requires Verizon's incumbent LEC entities not to "increase the rates in their interstate tariffs, including contract tariffs" for a period of "30 months from the Merger Closing Date" — expressly applies *only* to "DS1, DS3 and OCn special access services." *Verizon/MCI Order* App. G, Spec. Acc. Cond. 5. The condition says nothing about whether the services that it does mention should be classified going forward as either common or private carriage services. Moreover, that condition expressly "does not apply" to the rates for "Advanced Services that would have been provided by [Verizon's] separate Advanced Services affiliate under the terms of the *Bell Atlantic/GTE* [*Merger*] *Order*," *id.* n.577, which encompasses all packet-switched

services including ATM, Frame Relay, and the other wireline broadband transmission services at issue here.[24] Therefore, there is no inconsistency between this condition and Verizon's petition.

Similarly, the other conditions that Earthlink cites also do not address the regulatory classification of any service. Instead, those conditions state only that Verizon will provide reports of its performance under defined measurements for DS0, DS1, and DS3 and above facilities, and will not limit the availability of special access offerings to Verizon's affiliates. *See id.* App. G, Spec. Acc. Conds. 1, 3, 4 & Attach. A.

For these reasons, none of the conditions to which Earthlink points prescribes a particular regulatory classification even for the services to which they apply and, therefore, none is an impediment to the ruling sought by Verizon's petition.

[24] *See* Memorandum Opinion and Order, *Applikcation of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee*, 15 FCC Rcd 14032, App. D, ¶ 2 (2000) ("*Bell Atlantic/GTE Merger Order*") (definition of "Advanced Services").

CONCLUSION

For the foregoing reasons, and those set forth in Verizon's petition, the Commission should grant the petition for limited reconsideration.

Respectfully submitted,

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January 9, 2006

CERTIFICATE OF SERVICE

I hereby certify that, on the 9th day of January 2006, I caused a copy of the foregoing Reply Comments in Support of Verizon's Petition for Limited Reconsideration of the *Title I Broadband Order* to be served upon the parties on the service list below by first-class mail, postage prepaid.

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